



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF U-S- CORP.

DATE: MAR. 26, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of software consulting and development services, sought to employ the Beneficiary as a senior systems analyst. It requested his classification as a member of the professions holding an advanced degree under the second-preference, immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, “EB-2” category allows a U.S. business to sponsor a foreign national with a master’s degree, or a bachelor’s degree and five years of experience, for lawful permanent resident status.

The Director of the Texas Service Center denied the petition and the Petitioner’s following motions to reopen and reconsider. The Director concluded that the Petitioner did not establish its required ability to pay the proffered wage.

On appeal, the Petitioner submits additional evidence and asserts that the Director did not consider the entire record.

Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer seeking to permanently employ a foreign national in the United States must obtain U.S. Department of Labor (DOL) certification of the job opportunity. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). The DOL must determine whether the country lacks able, willing, qualified, and available workers for an offered position, and whether employment of a foreign national would hurt the wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL certifies a position, an employer must next submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If USCIS approves a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. THE ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence.¹ 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.* Here, the accompanying labor certification with a priority date of December 11, 2014, states the proffered wage of the offered position of senior systems analyst as \$106,000 a year. As of the appeal's filing, required evidence of the Petitioner's ability to pay in 2016 was not yet available. We will therefore consider the Petitioner's ability to pay in only 2014 and 2015.²

In determining ability to pay, USCIS first examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS next considers whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may also consider other factors affecting a petitioner's ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).³

The Petitioner submitted copies of IRS Forms W-2, Wage and Tax Statements, indicating that it paid the Beneficiary \$71,769.22 in 2014 and \$92,192.94 in 2015. Neither of those amounts equals or exceeds the annual proffered wage of \$106,000. Based solely on its payments to the Beneficiary, the Petitioner therefore has not demonstrated its ability to pay the proffered wage. Nevertheless, we credit the Petitioner's payments to the Beneficiary. It need only demonstrate its ability to pay the differences between the proffered wage and the wages paid, or \$34,230.78 in 2014 and \$13,807.06 in 2015.

Copies of the Petitioner's federal income tax returns for 2014 and 2015 reflect negative annual amounts of net income and net current assets. The Petitioner's net income and net current assets therefore do not demonstrate its ability to pay the annual differences between the proffered wage and the wages paid to the Beneficiary. Thus, based on examinations of wages paid, net income, and net current assets, the record does not establish the Petitioner's ability to pay the proffered wage in 2014 or 2015.

On appeal, the Petitioner asserts that other evidence demonstrates its ability to pay the proffered wage in 2014 and 2015. The Petitioner notes that its 2014 tax returns reflect retained earnings of more than \$873,000. Acknowledging that "[a] positive retained earnings figure does not

¹ This petition's priority date is the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

² In any future filing in this matter, the Petitioner must submit required evidence of its ability to pay in 2016, if available.

³ Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009).

automatically translate into a showing of ability to pay,” the Petitioner nonetheless contends that its retained earnings support its ability to pay the proffered wage.⁴

Retained earnings reflect the portion of a corporation’s profits since its inception that shareholders did not receive. Jae K. Shim & Joel G. Siegel, *Dictionary of Accounting Terms*, 397 (Barron’s 2010). As retained earnings are cumulative, adding retained earnings to net income and/or net current assets is duplicative. Therefore, we look at each year’s net income, rather than the cumulative total of the previous years’ net incomes less dividends represented by the line item of retained earnings. Moreover, retained earnings, which tax returns categorize under “Liabilities and Shareholders’ Equity,” do not necessarily remain available for spending. Companies often reinvest retained earnings into their businesses. *Id.* Here, the Petitioner has not demonstrated whether any of its retained earnings remained available to pay the proffered wage in 2014. The retained earning amount therefore does not establish the Petitioner’s ability to pay the proffered wage that year. *See Sitar Rest. v. Ashcroft*, No. CIV. A. 02-30197-MAP, 2003 WL 22203713, *4 (D. Mass. Sept. 18, 2003) (holding that a petitioner’s retained earnings did not “enhance [its] financial picture”).

The Petitioner also notes its submission of a letter from its chief financial officer (CFO). The letter asserts that the difference between the company’s accounts receivable and accounts payable in 2014 reflects current assets sufficient to pay the proffered wage. The Petitioner’s tax returns list its accounts payable that year as \$717,138. The record, however, does not indicate its corresponding amount of accounts receivable. The tax returns of record do not include a statement that purportedly details the Petitioner’s “Other current assets.” The record therefore does not corroborate the CFO’s assertion.

Also, the CFO states that his calculation omits more than \$2.7 million of current liabilities in the form of “mortgages, notes, [and] bonds payable in less than 1 year.” The CFO states: “Included in this category are operating lines of credit that are not due until more than two years out.” The record, however, does not corroborate the existence or terms of the Petitioner’s purported credit lines. Also, if these liabilities were not due within a year, the record does not explain why the Petitioner’s tax returns classify them as “current liabilities.” *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). The CFO’s letter therefore does not establish the Petitioner’s ability to pay the proffered wage in 2014.

For 2015, the Petitioner again cites its retained earnings in support of its ability to pay the proffered wage. But the Petitioner’s tax returns for that year reflect a negative amount of retained earnings. The record therefore does not establish the existence of any retained earnings from which the Petitioner could have paid the proffered wage in 2015.

⁴ The Petitioner quotes a response from officials of the former Immigration and Naturalization Service to a question from members of the American Immigration Lawyers Association (AILA) at a 1994 teleconference. *See* AILA Monthly Mailing, Eastern Service Center Liaison Teleconference (Nov. 16, 1994).

The Petitioner previously submitted financial statements for 2015, indicating its generation of more than \$210,000 in net income and a \$1.1 million surplus of accounts receivable over accounts payable. These figures differ from the negative amounts of net income and net current assets reflected in the Petitioner's tax returns for that year. In a letter, the Petitioner's accountant attributed the difference to his preparation of the financial statements using the accrual accounting method, which recognizes revenues when earned and expenses when incurred. Neither the financial statements nor the accountant, however, indicate that the statements were independently audited. Thus, the data in the financial statements likely constitutes representations of the Petitioner's management. The documents therefore lack the reliability of audited financial statements, or even of tax returns declared to be true under penalty of perjury.

The Petitioner also submitted copies of bank account statements for 2015, showing an average month-end balance of more than \$48,000. The Petitioner, however, has not established that these bank funds represent previously unconsidered net current assets. We presume that the net current asset amount on the Petitioner's 2015 tax return includes the bank funds. Thus, as we already considered the bank funds in our analysis of net current assets, the account statements do not establish the Petitioner's ability to pay the proffered wage in 2015.

Moreover, where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner filed multiple I-140 petitions for other beneficiaries. The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and the other petitions that were pending or approved as of this petition's priority date or filed after this petition's priority date.⁵ The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency. Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries.

⁵ The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered: after the other beneficiary obtains lawful permanent residence; if an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or before the priority date of the I-140 petition filed on behalf of the other beneficiary.

As previously indicated, in determining ability to pay, we may also consider factors beyond a petitioner's net income and net current assets. Under *Sonegawa*, we may consider such factors as: the number of years a petitioner has operated; its number of employees; the growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; a beneficiary's replacement of a current employee or outsourced service; or other evidence of a petitioner's ability to pay a proffered wage. *Matter of Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates that the Petitioner began business in 1992 and employed 91 people as of the petition's filing. The Petitioner's tax returns also indicate that, from 2014 to 2015, its revenues grew slightly. Unlike the petitioner in *Sonegawa*, however, the Petitioner here did not demonstrate its incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. The record also does not establish the Beneficiary's replacement of a current employee or outsourced service. Also unlike the petitioner in *Sonegawa*, the Petitioner here must demonstrate its ability to pay the combined proffered wages of multiple beneficiaries. Thus, a totality of the circumstances does not indicate the Petitioner's ability to pay the proffered wage under *Sonegawa*.

For the foregoing reasons, the Petitioner has not demonstrated its ability to pay the proffered wage from the petition's priority date onward.

III. THE EXPERIENCE REQUIRED FOR THE OFFERED POSITION

Although unaddressed by the Director, the record also does not establish the Beneficiary's possession of the minimum experience required for the offered position. A petitioner must establish a beneficiary's possession, by a petition's priority date, of all DOL-certified job requirements on an accompanying labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

Here, the labor certification states the minimum requirements of the offered position of senior systems analyst as a bachelor's degree and five years of experience, or a master's degree and three years of experience. The record establishes the Beneficiary's possession of a master's degree by the petition's priority date. On the labor certification, the Beneficiary attested that, before the petition's priority date, he also worked more than four years for two former employers in the United States.

The record contains a letter from one of the employers, establishing the Beneficiary's attainment of about 16 months of experience. See 8 C.F.R. § 204.5(g)(1) (requiring a petitioner to support a beneficiary's claimed, qualifying experience with letters from former employers). But the record does not establish the Beneficiary's remaining experience with the other employer. The Petitioner submitted a letter from the employer offering the Beneficiary a position. But the letter does not confirm the Beneficiary's employment in the position. The Petitioner also submitted an affidavit from a purported, former coworker of the Beneficiary. But the record lacks independent, objective evidence of the coworker's employment at the Beneficiary's other former employer and also lacks evidence that the regulatory-required employment verification letter is unavailable. The record therefore does not reliably establish the Beneficiary's claimed experience with the other employer.

The Beneficiary also attested that, before the petition's priority date, he worked for the Petitioner for about 14 months. A labor certification employer, however, cannot rely on experience that a foreign national gained with it, unless the experience was in a position substantially different than the offered position, or the employer demonstrates the impracticality of training a U.S. worker for the position. 20 C.F.R. § 656.17(i)(3). Here, the Petitioner did not establish its employment of the Beneficiary in a position substantially different than the offered position, or the impracticality of training a U.S. worker for the position. Also, even if the Petitioner could rely on the Beneficiary's experience with it, that experience, combined with his prior documented employment of 16 months, would not meet the requisite amount of three years.

Based on the foregoing, we find that the Petitioner has not established the Beneficiary's possession of at least three years of qualifying experience before the petition's priority date.

IV. THE VALIDITY OF THE LABOR CERTIFICATION

Finally, the record does not establish the validity of the accompanying labor certification. Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). A labor certification remains valid only for the particular job opportunity stated on it. 20 C.F.R. § 656.30(c)(2).

A business may not use another employer's labor certification unless it establishes itself as the employer's successor in interest. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482-83 (Comm'r 1986). A successor in interest must possess rights and obligations essential to continuing a predecessor's business. A successor must: 1) fully describe and document the transfer of ownership of all, or a relevant part, of the predecessor to it; 2) demonstrate that, but for the change of employer, the job opportunity remains the same as stated on the labor certification; and 3) establish eligibility for the requested benefit, including its ability to pay the proffered wage of the offered position since acquiring the predecessor. *Id.*

On appeal, a company asserts itself as the Petitioner's successor in interest. The company submits a copy of a bill of sale, indicating that, shortly after this appeal's filing, it acquired assets of the Petitioner. The record, however, does not establish the company as the Petitioner's successor. The bill of sale does not specify the assets the company acquired. The record therefore neither fully documents the transaction, nor establishes the company's acquisition of rights and obligations needed to continue the Petitioner's business. The record also lacks evidence demonstrating the unchanging nature of the job opportunity and the purported successor's ability to pay the proffered wage since acquiring the Petitioner's business. Thus, to demonstrate the validity of the accompanying labor certification, the company must establish its claimed successorship of the Petitioner's business. Here, it has not done so.

V. CONCLUSION

The record on appeal does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward, the Beneficiary's possession of the required experience, or that the continued validity of the labor certification. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of U-S-Corp.*, ID# 980465 (AAO Mar. 26, 2018)